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*Securing the present  
and protecting  
the future*

## **PROTECTING ADULTS AND SAFEGUARDING RIGHTS: WISCONSIN'S NEW GUARDIANSHIP and PROTECTIVE SERVICES LAWS**

**2005 WISCONSIN ACT 387 (2005 Senate Bill 391)  
2005 WISCONSIN ACT 264 (2005 Assembly Bill 785)  
2005 WISCONSIN ACT 388 (2005 Assembly Bill 539)**

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### **I. Guardianship Reform**

#### **A. 2005 Wisconsin Act 387**

(Senate Substitute Amendment 1 to 2005 Senate Bill 391 as amended by  
Senate Amendments 1 & 2)

1. Initiated by Elder Law Section of State Bar of Wisconsin and CWAG and Elder Law Center staff.
2. Co-sponsored by Senators Olsen, Miller, Roessler, Darling, Erpenbach, Risser, Harsdorf, Plale and Wirsch.
3. Introduced October 17, 2005.
4. Signed by Governor May 4, 2006.
5. Effective Date: First day of 7<sup>th</sup> month beginning after publication  
December 1, 2006.
6. Websites
  - a. For pre-December 1, 2006 Ch. 880, Wis. Stats. -  
[www.legis.state.wi.us/statutes/2003/03Stat0880.pdf](http://www.legis.state.wi.us/statutes/2003/03Stat0880.pdf)
  - b. For pre-November 1, 2006 Ch. 55, Wis Stats. -  
[www.legis.state.wi.us/statutes/2003/03Stat0055.pdf](http://www.legis.state.wi.us/statutes/2003/03Stat0055.pdf)
  - c. For Ch. 54, Wis. Stats. as revised by Acts 264, 387 and 388 -  
[www.legis.state.wi.us/statutes/Stat0054.pdf](http://www.legis.state.wi.us/statutes/Stat0054.pdf)

<sup>1</sup> The author gratefully acknowledges the contributions of Attorney Betsy Abramson to this outline.

- d. For Ch. 55, Wis. Stats. as revised by Acts 264, 387 and 388 - [www.legis.state.wi.us/statutes/Stat0055.pdf](http://www.legis.state.wi.us/statutes/Stat0055.pdf)
- e. For Act 387- [www.legis.state.wi.us/2005/data/acts/05Act387.pdf](http://www.legis.state.wi.us/2005/data/acts/05Act387.pdf)
- f. For SB 391 and amendments - [www.legis.state.wi.us/2005/data/SB391hst.html](http://www.legis.state.wi.us/2005/data/SB391hst.html)  
(ignore link to bill & scroll down to link to Substitute Amendment)
- g. For CWAG's website and links - [www.cwag.org/legal/guardian-support](http://www.cwag.org/legal/guardian-support)

## **B. Summary**

- 1. Totally revises the guardianship statute.
- 2. Repeals some parts of Subchapter I of Chapter 880.
- 3. Amends virtually every section of Subchapter I that's not repealed.
- 4. Renumbers every surviving section.
- 5. Creates new sections.
- 6. Chapter 880 will no longer exist – most everything is placed in new Chapter 54; psychotropic medication sections move to Chapter 55.
- 7. Current Subchapters II (Uniform Veterans Guardianship Act), III (Uniform Transfer to Minors Act), IV (Securities Owned by Minors, Incompetents and Spendthrifts) and V (Uniform Custodial Trust Act) are combined into new Subchapter VII in new Chapter 54.

## **C. Organization of new statute**

- 1. Subchapter I: Definitions
- 2. Subchapter II Appointment of Guardian
- 3. Subchapter III: Nomination of Guardian; Powers and Duties; Limitations
- 4. Subchapter IV: Procedures
- 5. Subchapter V: Post-Appointment Matters
- 6. Subchapter VI: Conservatorships
- 7. Subchapter VII: Uniform Guardianship Acts

## **D. Subchapter 1: Definitions § 54.01 - selected definitions provided**

- 1. "Degenerative brain disorder" replaces "infirmities of aging" – "the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody."
- 2. "Incapacity" – "the inability of an individual effectively to receive and evaluate information or to communicate a decision with respect to the exercise of a right or power."

3. "Individual found incompetent" replaces "the incompetent" – "an individual who has been adjudicated by a court as meeting the requirements of 54.10 (3)." (See section E – 3, 6, 7 and 8, below.)
4. "Interested person" for purposes of petition for guardianship -
  - a. the proposed ward, if 14 years or older;
  - b. the spouse or adult child of the proposed ward;
  - c. the parent of a proposed ward who is a minor;
  - d. an heir who can be reasonably ascertained with due diligence, if no spouse, child or parent;
  - e. the nominated guardian;
  - f. a guardian or other fiduciary appointed by a court of any state;
  - g. a trustee for a trust established by or for the proposed ward;
  - h. an agent under a Power of Attorney for Health Care;
  - i. an agent under a Durable Power of Attorney;
  - j. if the proposed ward is a minor, the person exercising principal responsibility for care and custody during last 60 days;
  - k. if the proposed ward is a minor and has no living parent, anyone nominated as a fiduciary in a will or other written instrument;
  - l. if the proposed ward is receiving moneys paid, or if moneys are payable, by the federal VA, a representative of the federal VA;
  - m. if the proposed ward is receiving moneys paid, or if moneys are payable, by the state VA, a representative of the state VA;
  - n. if the proposed ward is receiving long-term support or similar public benefits, the county department of human/social services;
  - o. the corporation counsel of the county in which the petition is filed and the county where the proposed ward resides;
  - p. any other person required by the court.
5. "Interested person" for purposes of proceedings subsequent to an order for guardianship –
  - a. the guardian;
  - b. the spouse or adult child of the ward or the parent of a minor child;
  - c. the county of venue, through the county's corporation counsel, if the county has an interest;
  - d. an agent under a durable Power of Attorney unless revoked or terminated by the court;
  - e. any other individual required by the court.
6. "Least restrictive" – "that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect."

7. “Other like incapacities” – “those conditions incurred at any age that are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition that substantially impairs an individual from providing for his or her own care or custody.”
8. “Serious and persistent mental illness” - “a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration.” Does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.
9. “Spendthrift” – “a person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct, is unable to manage effectively his or her financial affairs or is likely to affect the health, life, or property of himself, herself, or others so as to endanger his or her support and the support of his or her dependents, if any, or expose the public to responsibility for his or her support.”

**E. Subchapter II: Appointment of Guardian §§ 54.10 & 54.12**

1. Contains all of the standards and required findings for the appointment of a guardian of an adult.
2. Retains current law requirement of clear and convincing evidence. §§ 54.10 (2) (a) & 54.44 (2).
3. Authorizes the appointment of a guardian for an individual who is incompetent as early as age 17 years and 9 months. § 54.10 (3) (a) 1.
  - AB 785 permits the filing of a protective placement petition 6 months before a minor reaches age 18. § 55.06.
4. Authorizes the appointment of a guardian of the person, guardian of the estate or both for an individual who is a minor (§ 54.10 (1)); or an individual who is incompetent (§ 54.10 (3) (a)).
5. Authorizes the appointment of a guardian of the estate for a spendthrift. § 54.10 (2) (a).

6. To appoint either a guardian of the person or guardian of the estate for an individual who is incompetent, the court must find that that there is no less restrictive means of meeting the need for assistance; specifically, the court must find that “the individual’s need for assistance in decision-making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.” § 54.10 (3) (a) 4.
7. To appoint a guardian of the person for an individual who is incompetent, the court must also find that “because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety.” § 54.10 (3) (a) 2.
8. To appoint a guardian of the estate for an individual who is incompetent, the court must also find that “because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs” and one of the following applies:
  - a. the individual has property that will be dissipated in whole or in part;
  - b. the individual is unable to provide for his or her support; or
  - c. the individual is unable to prevent financial exploitation.§ 54.10 (3) (a) 3.
9. Old age, eccentricity, poor judgment or physical disability is not a reason to appoint a guardian for an individual alleged to be incompetent unless the individual is unable to communicate decisions effectively in any way. § 54.10 (3) (b).
10. In appointing a guardian, the court must consider:
  - a. the report of the GAL;
  - b. the report of the psychologist or physician appointed by the court, and any other evaluations ordered by the court or offered by a party;
  - c. any advance planning by the proposed ward to avoid guardianship;
  - d. whether appointment of a guardian is the least restrictive means of meeting the proposed ward’s needs;
  - e. the preferences of the proposed ward;
  - f. the nature and extent of the proposed ward’s care and treatment needs and property and financial needs;
  - g. whether the proposed ward is at risk of abuse, exploitation, neglect or violation of rights;

- h. whether the proposed ward can adequately understand and appreciate the consequences of his/her impairment;
- i. the proposed ward's management of the activities of daily living;
- j. the proposed ward's understanding and appreciation of the nature and consequences of any inability he or she may have with regard to personal needs or property management;
- k. any physical or mental illness, alcoholism or other drug dependence and prognosis;
- l. any medication and the effect on the proposed ward's behavior, cognition and judgment;
- m. whether the disability is likely to be temporary or permanent;
- n. other relevant evidence.

§§ 54.10 (2) (b) & (c).

**F. Subchapter III: Nomination of Guardian; Powers and Duties; Limitations**  
 §§ 54.15, 54.18, 54.19, 54.20, 54.21, 54.22, & 54.25.

- 1. When courts choose who to appoint as guardian, opinions of proposed ward, family and others are relevant, but ultimately "best interests" control. § 54.15 (1).
- 2. Requires consideration of potential conflicts of interest resulting from the prospective guardian's employment or other potential conflicts of interest. § 54.15 (1m).
- 3. Directs the court to appoint as guardian any person nominated in writing by a proposed ward over age 14, unless not in proposed ward's best interests. § 54.15 (4) (a).
- 4. Directs court to appoint the agent under a durable power of attorney as guardian of the estate unless not in best interests of proposed ward. § 54.15 (2).
- 5. Directs court to appoint the agent under a power of attorney for health care as guardian of the person unless not in best interests of proposed ward. § 54.15 (3).
- 6. Directs court to appoint one or both parents as guardians of a minor unless proposed ward objects or not in best interests of proposed ward. § 54.15 (5).
- 7. Preserves provision permitting parents to nominate a proposed guardian by will or other testamentary provision. § 54.15 (6).

8. Permits appointment of non-profit corporate guardian or an unincorporated association approved by the court only if no suitable individual is available and state finds the entity suitable to perform such duties. § 54.15 (7).
9. Requires a proposed guardian to submit to the court a sworn and notarized statement indicating whether he or she has ever been convicted of certain crimes, filed for or received bankruptcy protection, had certain professional licenses or certificates suspended or revoked, or been listed in caregiver registry. § 54.15 (8).
10. General duties and powers of Guardian - § 54.18.
  - a. Limits the guardian to powers that are authorized by statute or court order and that are the least restrictive form of intervention; ward retains all rights not assigned to guardian or otherwise limited by statute.
  - b. Directs the guardian “to exercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in his or her own affairs” and to “exhibit the utmost trustworthiness, loyalty and fidelity in relation to the ward.”
  - c. Prohibits guardian from borrowing funds from the ward.
  - d. Requires court approval before guardian can purchase property of the ward.
  - e. Requires court approval of terms, rate of interest and any requirement for security before ward’s funds are lent to another.
  - f. Provides immunity to guardians who perform their duties “in good faith, in the best interests of the ward, and with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs.”
11. Duties of Guardian of the Estate - § 54.19.
  - a. Provide the ward with the greatest amount of independence and self-determination with respect to property management in light of the ward’s functional level, understanding, and appreciation of his or her functional limitations and the ward’s personal wishes and preferences with regard to managing the activities of daily living.
  - b. Take possession of the ward’s real and personal property.
  - c. Retain, expend, sell or invest the ward’s property and income.
  - d. Determine if ward executed a will and, if so, the will’s location and the appropriate persons to be notified of ward’s death; if death occurs, notify them of death.
  - e. Use ward’s income and property to maintain and support the ward and any dependents.

- f. Prepare and file an annual account.
  - g. Deliver the ward's assets to the entitled persons upon ward's death.
  - h. Pay the ward's legally enforceable debts, including any taxes owed.
  - i. File with the register of deeds of any county in which the ward possessed real property a sworn statement that describes the property, the date the ward was determined to be incompetent, and the contact information of the guardian.
  - j. Other duties as required by the court.
12. Powers of Guardian of the Estate that require court approval - § 54.20 (2).
- a. Make gifts of the ward's property after extensive notice to interested parties and after court's consideration of various factors, including: the nature and extent of ward's estate and current and future obligations; the opinion of any guardian of the person, the nature of the property to be transferred, the wishes of ward if ascertainable, the past practices of ward, whether ward had executed a will or similar instrument, and the current or future effect on ward's eligibility for public assistance. § 54.21.
  - b. Transfer ward's funds to an existing revocable living trust created by the ward for his or her benefit, or for the benefit of any of the ward's dependents.
  - c. Establish trusts permitted under federal Medicaid law (special needs trusts).
  - d. Purchase an annuity or insurance contract and exercise ownership rights.
  - e. Exercise rights under a retirement plan or account.
  - f. Exercise any elective inheritance rights.
  - g. Exercise marital property rights.
  - h. Support an individual whom the ward is not legally obligated to support.
  - i. Convey or release a contingent or expectation interest in property.
  - j. Continue the business of the ward.
13. Powers of Guardian of Estate that do not require court approval - § 54.20 (3).
- a. Support another whom the ward is legally obligated to support.
  - b. Enter into a contract.
  - c. Exercise options to purchase securities or other property.
  - d. Authorize access to or release of confidential financial records.
  - e. Apply for public and private benefits.
  - f. Retain real or personal property that ward already possesses or acquires by gift or inheritance during the guardian's appointment.
  - g. Sell property at fair market value.

- h. Invest proceeds of sale of assets.
- i. Appear for and represent the ward in actions.

14. Duties of Guardian of the Person - § 54.25 (1).

- a. Make an annual report to the court and county.
- b. Endeavor to secure any necessary care or services that are in the ward's best interests.
- c. Regularly conduct in-person inspection of ward's condition, surroundings, treatment; examine health care and treatment records; attend staffings, inquire into risks and benefits and alternatives to proposed treatments, consult with providers of health care and social services in making all necessary treatment decisions.

15. Powers of Guardian of the Person - § 54.25 (2).

- a. Guardian of the person has only those powers ordered by court. § 54.25 (2) (a)
- b. Delineates rights retained, i.e, never lost, by ward: § 54.25 (2) (b)
  - i. Have access to and communicate privately with the court and with governmental representatives, including the rights to have input into plans for support services, the right to initiate grievances, and the right to participate in administrative hearings and court proceedings.
  - ii. Have access to, communicate privately with, and retain legal counsel, with fees paid from the income and assets of the ward, subject to court approval.
  - iii. Have access to and communicate privately with the protection and advocacy agency and the state ombudsman.
  - iv. Protest a residential placement, and review the need for guardianship and/or protective services.
  - v. Exercise constitutional rights such as rights to free speech, freedom of association and the free exercise of religious expression.
- c. Specifies the rights that the court may declare an individual incompetent to exercise: consent to marriage, execute a will, serve on a jury, hold certain operator's licenses, consent to sterilization, consent to organ, tissue or bone marrow donation, and/or vote. Ward retains any of these rights unless court removes it. If removed, guardian may not exercise any of these rights, although court can order that ward has right to exercise any of these rights with approval of guardian. § 54.25 (2) (c).
- d. Clarifies that guardian may consent to voluntary or involuntary medical examination and treatment and to the voluntary receipt of

- medication, including psychotropic medications. § 54.25 (2) (d) 2. a.
- e. Clarifies that guardian may consent to the administration of psychotropic medications, unless ward “protests.” Guardian may only consent to the involuntary administration of psychotropic medications under a protective services court order. § 54.25 (2) (d) 2. a.
- f. Permits guardian to consent to ward’s participation in research, unless clear that ward would never have consented. Guardian permitted to consent to research if it might not help the ward but might help others, if no more than minimal risk to the ward. § 54.25 (2) (d) 2. b.
- g. Permits guardian to consent to ward’s participation in research that involves greater than minimal risk even if it might not help the ward if consistent with ward’s wishes. § 54.25 (2) (d) 2. c.
- h. Permits guardian to consent to experimental treatment, if in best interests and no prior expressed contrary wishes. § 54.25 (2) (d) 2. d.
- i. Specifies the usual powers of a guardian of the person: informed consent to social and supported living services and to release of confidential records; make decisions about travel; admit to residential facilities choose providers of services; make decisions regarding employment; initiate a petition to terminate marriage; act as advocate in all proceedings; etc. § 54.25 (2) (e)-(p).
- j. Requires guardian to make decisions based on considerations of “least possible restriction” on personal liberty and exercise of constitutional and statutory rights, honoring previously and currently stated preferences and whether ward’s estate is sufficient to pay for the needed services. § 54.25 (2) (d) 3.

**G. Subchapter IV: Procedures** §§ 54.30, 54.34, 54.36, 54.38, 54.40, 54.42, 54.44, 54.46, 54.47, 54.48, 54.50, 54.52, 54.54, 54.56, & 54.57.

1. Failure of petitioner to provide notice to all interested persons deprives court of jurisdiction unless notice waived. Notice is considered to be given by proof of personal delivery, or by proof of mailing by certified mail with return receipt requested to last-known address or of faxing to last known fax number. § § 54.38 (1) and (2) (b) 4.
2. Adopts with modification the holding for transfer of a foreign guardianship in *Jane E.P., Grant Co DSS v. Unified Board of Grant and Iowa Counties*, 2005 WI 106 – does not require that petitioner first get permission of foreign court to transfer guardianship; requires petitioner to give notice to foreign court and interested persons and request certain information from foreign court. § 54.34 (3).

3. Provides process for determining venue- § 54.30 (2).h
  - a. For state resident, county of residence or county where proposed ward is physically present.
  - b. For non-resident with no guardian, county where proposed ward or assets may be found or in county in which petitioner proposes proposed ward reside.
  - c. For individual under a foreign guardianship, county where ward resides or intends to reside. § 54.30.
4. Provides standards for determination of county of responsibility regardless of disability (aged, mentally ill, developmental disabilities) or facility (state facility, nursing home, community-based residential facility, etc.). § 51.40 (2).
5. Provides proposed ward with additional rights regarding required physical/psychological examination - right to remain silent during examination, request additional examination, court order to submit to an examination. § 54.36 (1).
6. Permits physician/psychologist to obtain access to proposed ward's health care and treatment records without consent of proposed ward. § 54.36 (3).
7. Requires appointment of GAL in more situations – temporary guardianships, any action to expand, review or terminate a guardianship or to review conduct of a guardian. § 54.40 (1).
8. Codifies Wisconsin Supreme Court rule mandating continuing legal education for GALs on specific subjects. § 757.48 (1) (a).
9. Maintains current duties of GAL – adds requirements that GAL interview proposed guardian and/or stand-by guardian, and report to the court concerning suitability to serve; review any existing powers of attorney, interview any previously appointed agent and report to court whether power of attorney is adequate to preclude need for guardianship. GAL required to attend all court hearings. § 54.40 (4) (c)-(h).
10. Specifies rights of proposed ward: to counsel, to jury trial, to independent examination, to pay for any expenses in contesting proceedings *before* paying other attorney or GAL fees. § 54.42.
11. Requires hearing to be held within 90 days. § 54.44(1) (a).
  - a. But Act 264 requires protective placement/services petitions to be heard within 60 days of filing, unless 45-day extension granted. § 55.10 (1).

- b. Act 264 requires involuntary psychotropic medication hearings to be held within 30 days. § 55.14 (7).
  - c. § 50.06 (5) (a) (1), Stats., continues to require hearings within 60 days.
- 12. Requires proposed guardian to be present unless excused or good cause shown to permit attendance by phone. § 54.44 (3) (a).
- 13. Petitioner's responsibility to ensure that proposed ward attends the hearing unless GAL, after personal interview with proposed ward, waives attendance and certifies in writing to the court why the proposed ward is unable to attend; GAL shall consider the ability of the proposed ward to understand and meaningfully participate, the effect of attendance on his or her physical or psychological health and the proposed ward's wishes. If unable to attend only because of residency in facility, physical inaccessibility or lack of transportation, hearing must be moved to a place the proposed ward will be able to attend. § 54.44 (4) (a).
- 14. Requires court to dismiss petition if it determines that prior advance planning by proposed ward makes guardianship unnecessary. § 54.46 (1) (a) 2.
- 15. If co-guardians appointed, default provision is that consent of all co-guardians needed for a decision, unless court orders otherwise. § 54.46 (2) (a).
- 16. Durable powers of attorney or powers of attorney for health care will remain in effect unless good cause shown to revoke or limit. § 54.46 (2) (b) & (c).
- 17. Pre-existing power of attorney not total bar prohibiting payment of petitioner's attorney's fees from adjudicated ward's estate but a factor in determining if ward should pay petitioner's costs. § 54.46 (3) (a).
- 18. Specifies process for obtaining temporary guardian – standard is reasonable likelihood that proposed ward is incompetent; requires appointment of GAL; requires hearing which may be held no earlier than 48 hours after filing unless good cause shown; court must specify the powers delegated to temporary guardian; temporary guardian may not sell real estate or expend more than \$2,000 unless court approves and orders bond; temporary guardian appointed for up to 60 days with one 60 day extension for good cause; must be 90 day period between temporary guardianships. § 54.50.

19. Clarifies that a stand-by guardian may act when the primary guardian is unable or unwilling to act, as well as at removal, resignation or death of a guardian. Requires stand-by guardian to notify the court and court to then issue new Letters of Guardianship. § 54.52 (2).

**H. Subchapter V: Post-Appointment Matters** §§ 54.60, 54.62, 54.625, 54.63, 54.64, 54.66, 54.68, 54.72, 54.74, & 54.75.

1. Requires inventory to include marital property assets, regardless of how titled. § 54.60 (1).
2. Requires filing of inventory within 60 days, unless court modifies date. § 54.60 (3).
3. Requires all guardians of the estate, including corporate guardians, to provide annual accountings. Court may require that accountings be provided to certain persons. Guardian may request court to order an accounting to the guardian by other individuals or entities of any income or assets of ward. § 54.62 (1).
4. Permits court to determine that an accounting is not needed for estates smaller than \$50,000 (currently \$5,000). § 54.62 (3).
5. Accounting for married ward may be waived or requirements modified. § 54.62 (4).
6. Provides that reviews and modifications of guardianships may be requested by wards age 18 and over, the guardian or anyone on ward's behalf, if at least 180 days since last request or if exigent circumstances. Requires appointment of GAL, hearing with ward present, right to counsel and jury trial. § 54.64 (2) (a).
7. Lists specific criteria for removal of guardian, cause for court action against a guardian and remedies. Guardian may be removed for failure to file inventory timely or to file an account that is accurate and complete; fraud, waste or mismanagement; abusing or neglecting the ward or knowingly permitting others to do so; engaging in self-dealing; failing to provide adequately for the personal needs of the ward; failing to provide due diligence and reasonable care in assuring that personal needs are being met in the least restrictive environment consistent with needs and capacities. Hearing within 10 days. Forfeiture up to \$10,000. § 54.68 (2)-(4).

8. Requires court approval of compensation for guardian and reimbursement of expenses; lists criteria for a court determination of compensation to a guardian. § 54.72.

**I. Subchapter VI: Conservatorships § 54.76**

1. Any adult resident who is unwilling or believes that he or she is unable to properly manage his or her income may voluntarily apply for appointment of a conservator of the estate. § 54.76 (1).
2. Specifies that conservators have all powers of a guardian of the estate. § 54.76 (3).
3. Specifies that a conservatee may make gifts of his/her property, subject to conservator's approval. § 54.76 (3).
4. Clarifies that conservatorships may only be terminated pursuant to a hearing, and only under the following circumstances: under court's own motion, if a guardian is appointed, if the conservatee dies, if the conservatee becomes a resident of another state, or for cause. § 54.76 (7) (a).

<b>II. Protective Services and Placement</b>
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**A. 2005 Wisconsin Act 264**

**(2005 Assembly Bill 785, as amended by Assembly Amendments 1, 2, 3)**

1. Result of Joint Legislative Council's Special Study Committee on the Recodification of Ch. 55, Placement & Services for Persons with Disabilities.
2. Dubbed "Ch. 55 Recodification."
3. Introduced October 25, 2005.
4. Signed by Governor on April 5, 2006.
5. Effective Date: First day of 7<sup>th</sup> month beginning after publication  
November 1, 2006.
6. Websites
  - a. For pre-December 1, 2006 Ch. 880, Wis. Stats. - [www.legis.state.wi.us/statutes/2003/03Stat0880.pdf](http://www.legis.state.wi.us/statutes/2003/03Stat0880.pdf)
  - b. For pre-November 1, 2006 Ch. 55, Wis. Stats. - [www.legis.state.wi.us/statutes/2003/03Stat0055.pdf](http://www.legis.state.wi.us/statutes/2003/03Stat0055.pdf)
  - c. For Ch. 54, Wis. Stats. as revised by Acts 264, 387 and 388 - [www.legis.state.wi.us/statutes/Stat0054.pdf](http://www.legis.state.wi.us/statutes/Stat0054.pdf)
  - d. For Ch. 55, Wis. Stats. as revised by Acts 264, 387 and 388 - [www.legis.state.wi.us/statutes/Stat0055.pdf](http://www.legis.state.wi.us/statutes/Stat0055.pdf)
  - e. For Act 264 – [www.legis.state.wi.us/2005/data/acts/05Act264.pdf](http://www.legis.state.wi.us/2005/data/acts/05Act264.pdf)

- f. For AB 785 and amendments -  
[www.legis.state.wi.us/2005/data/AB785hst.html](http://www.legis.state.wi.us/2005/data/AB785hst.html)
- g. For CWAG's website and links –  
[www.cwag.org/legal/guardian-support](http://www.cwag.org/legal/guardian-support)

## **B. Summary**

1. Revises the statutes, primarily Ch. 55, governing voluntary and involuntary protective services and placement.

## **C. New Terms and Definitions**

1. “Degenerative brain disorder” replaces “infirmities of aging” – “the loss or dysfunction of brain cells to the extent that an individual is substantially impaired in his or her ability to provide adequately for his or her own care or custody.” § 55.01 (1v).
2. “Serious and persistent mental illness” replaces “chronic mental illness” – no significant change in definition. § 51.01 (4t).

## **D. Procedure and Procedural Rights**

1. Must be resident of state or have filed a petition to transfer a foreign guardianship if not a resident. § 55.06.
2. Time for hearings
  - a. Protective placement/services petitions must be heard within 60 days of filing, unless 45-day extension granted. § 55.10 (1).
    - i. But Act 387 requires guardianship petitions to be heard within 90 days. § 54.44 (1).
    - ii. § 50.06, Stats., requires hearings within 60 days.
  - b. Petitions for involuntary administration of psychotropic medication must be heard within 30 days; no provision for extension. § 55.14 (7).
3. Creates a procedure for pursuing court-ordered protective services, nearly identical to protective placement; same due process rights as with protective placement. §§ 55.075, 55.08, 55.09 & 55.10.
4. Retains current law which permits county protective services agency to obtain a court order authorizing entry accompanied by law enforcement or fire department to provide or investigate need for emergency services; if probable that substantial physical harm, irreparable injury or death may occur in time it takes to obtain order, law enforcement or fire department

(but not county department) may enter without court order and must notify court within 14 days of entry. §§ 55.13 (4) and (5).

5. Includes procedural rights to: counsel; jury trial; present and cross-examine witnesses; obtain copies of any evaluations; request that hearing be closed. §55.10 (4).
6. Petitioner's responsibility to ensure that the individual sought to be protected attends the hearing unless GAL, after personal interview with individual, waives attendance and certifies in writing to the court why the individual person is unable to attend; GAL shall consider the ability of the individual to understand and meaningfully participate, the effect of attendance on his or her physical or psychological health and the individual's wishes. If unable to attend only because of residency in facility, physical inaccessibility or lack of transportation, hearing must be moved to individual upon request. § 55.10 (2) & Assembly Amendment 1.
7. Guardian ad litem duties are those required by GALs in guardianship proceedings, plus GAL must interview guardian. GAL must be present at all hearings if individual sought to be placed does not have full legal counsel; court may excuse GAL's appearance based on information contained in GAL's written report. § 55.10 (4) (b).
8. Permits a health care agent to be an "interested person" in a guardianship and/or protective placement proceeding; also requires county APS investigator to interview an agent under an activated power of attorney for health care; permits the agent to consent to a medical examination; permits the agent to request and consent to voluntary protective services for his or her principal; must be provided notice of any Ch. 55 proceeding; and must receive a copy of the county APS agency's annual review of a protective placement. §§ 55.05 (2) (b), 55.09, 55.11, & 55.18.
9. Permits an already adjudicated ward, who is later the subject of a protective placement petition, to have the right to an independent evaluation, at county's expense if indigent. § 55.11.
10. Pre-existing power of attorney not total bar prohibiting payment of petitioner's attorney's fees from adjudicated ward's estate but a factor in determining if ward should pay petitioner's costs. § 55.075 (4) (a).
11. Clarifies that placement units, guardians, the county or DHFS can transfer individuals under protective placement; guardian must consent to transfer unless emergency; 10 days written notice of transfer required,

unless emergency; hearing required if objections to proposed transfer or to emergency transfer. § 55.15.

12. Establishes requirements and procedures for *Watts* reviews; states criteria for county department review and report; requires county APS agencies to have written policies about annual review procedures and Register in Probate to certify annually that reviews are complete or explain why not done. § 55.18.
13. Provides more detailed procedures than current law for modifying or terminating a protective placement, including how often a hearing can be held, and petition, notice and hearing requirements. GAL, among others, may petition court for hearing on modification of placement; court must hold hearing within 21 days unless hearing was held within past 6 months. §§ 55.16 & 55.17.

#### **E. Admissions**

1. Maintains current “fewer than 16 beds” distinction for authority of guardian to admit without a protective placement order. Clarifies authority of guardian from foreign jurisdiction.
  - a. When ward is resident but under foreign guardianship, guardian has authority to admit to under 16 bed facility for up to 60 days; if longer stay, petition to transfer foreign guardianship must be filed within 60 days after admission. § 55.055 (1) (c).
  - b. When ward is not a resident and is under foreign guardianship but guardian is resident, guardian has authority to admit to under 16 bed facility if intending to move ward to Wisconsin within 30 days of admission; if stay is longer than 60 days, petition to transfer foreign guardianship must be filed within 60 days of admission. § 55.055 (1) (d).
2. Emergency Protective Placement
  - a. Permits law enforcement, guardian or county APS representative to make an emergency protective placement based on a reliable report made to them (as in ch. 51) in addition to current standard of personal observation. § 55.135 (1).
  - b. Eliminates requirement that individual will suffer irreparable injury or death; permits placement if probable that individual is so totally incapable of providing for own care or custody as to create a substantial risk of serious harm to self or others. § 55.135 (1).

- c. Requires that each county department designate at least one medical facility or protective placement facility as intake facility for the purpose of emergency protective placements. § 55.02 (2) (b).
- 3. From hospitals to nursing homes - § 50.06 (2) (d).
  - a. Revises sec. 50.06 (Act 187) to clarify that an incapacitated individual who verbally objects or otherwise actively protests his or her admission may nevertheless be admitted.
  - b. Requires person in charge of facility to immediately notify the county protective services department (or the agency with which the department contracts) of the resident's objection or protest.
  - c. County department or agency must visit resident not later than 72 hours after notification – if protest is not withdrawn and if protective placement or emergency protective placement criteria are not satisfied, attempt to have the resident released, or file for emergency protective placement or protective placement.
  - d. Court, with the permission of the facility, may order that incapacitated individual remain in the facility pending the outcome of protective placement proceedings.
  - e. No change in requirement that resident be transferring from a hospital.
- 4. Recuperative and Other Care
  - a. Expands authority of guardian to admit ward to nursing home and other facilities without protective placement. § 55.055 (1) (b) and Assembly Amendment 1.
    - i. Deletes current requirement that ward be transferring from a hospital.
    - ii. Expands authority to any facility for which protective placement is otherwise required.
    - iii. Ward must be in need of recuperative care or be unable to provide for own care or safety so as to create a serious risk of substantial harm to himself or herself or others.
    - iv. Guardian has authority for 60 days (currently 3 months), followed by additional 60 day period if petition for protective

placement is brought or by an additional 30 days for discharge planning if no protective placement petition.

- v. Admission permitted if ward has primary diagnosis of mental illness or developmental disability *unless* the primary purpose of admission is for treatment or services related to the individual's mental illness or developmental disability.
  - vi. Process for handling objection or protest by ward remains unchanged – same as new process for sec. 50.06 admissions.
- b. Permits guardian of ward found incompetent in another state to admit to facility for recuperative and other care if ward is resident of Wisconsin and if petition to transfer foreign guardianship and petition for protective placement is filed within 60 days after admission. § 55.055 (1) (c).
  - c. Permits resident of Wisconsin who is guardian of ward found incompetent in another state and who resides in another state to admit to a facility for recuperative and other care if intending to move the ward to Wisconsin within 30 days of admission if a petition to transfer guardianship and petition for protective placement is filed in Wisconsin within 60 days of the ward's admission. § 55.055 (1) (d).
  - d. Retains guardian's authority to admit for purposes of respite care when guardian and ward live together. § 55.055 (5).
5. Inpatient Mental Health Treatment
- a. Voluntary admission to inpatient treatment facility
    - i. Retains current law that permits guardian to consent to voluntary admission of ward to inpatient treatment facility if ward also consents. § 51.10 (8).
    - ii. Provides, in addition, that guardian may consent to the voluntary admission of ward to an inpatient treatment facility if ward does not indicate a desire to leave the facility and if the procedures for voluntary admission in Ch. 51 are followed. § 51.10 (8).
    - iii. Applies to all inpatient treatment facilities, not only county-funded or operated facilities.

- b. Involuntary admission to inpatient treatment facility.
  - i. Can only be accomplished pursuant to §§ 51.15 or 51.20. § 55.12 (2).
  - ii. Repeals admission sections found unconstitutional by *Watts*.

#### **F. Consent to Administration of Medication and Treatment**

- 1. Guardian, unless powers otherwise limited by court, may consent to involuntary administration of medication, other than psychotropic medication, and to involuntary medical treatment that is in the ward's best interests. §§ 880.38 (2) & (4).

#### **G. Psychotropic Medications**

- 1. Permits guardian to consent to psychotropic medications for non-protesting ward if the guardian has made a good faith attempt to discuss receipt of medication and if the ward does not protest. § 880.38 (4).
- 2. Provides a non-Chapter 51-related process and standard for involuntary administration of psychotropic medication; an order for involuntary administration of psychotropic medication is a Ch. 55 protective service. § 55.14.
  - a. "Psychotropic medication" – "a prescription drug, as defined in s. 450.01 (2), that is used to treat or manage a psychiatric symptom or challenging behavior." §§ 55.01 (6s) & 55.14 (1) (d).
  - b. Defines "involuntary" to include hiding in food or drink with knowledge of protest, forcible restraint to administer, and requiring administration as condition of receipt of privileges or benefits. § 55.14 (1) (a).
  - c. Defines "protest" to mean more than one discernible negative response and more than silence. § 55.14 (1) (c).
  - d. Petition must allege, in addition to requirements for protective services petition, that:
    - i. A physician has prescribed psychotropic medication;
    - ii. The individual is not competent to refuse psychotropic medication;

- iii. The individual has refused to take the psychotropic medication voluntarily or attempting to administer psychotropic medication voluntarily is not feasible or is not in the best interests of the individual; reasons for refusal or lack of feasibility or not in best interests must be included; evidence of reasonable number of documented attempts must be included;
- iv. The individual's condition is likely to improve;
- v. The individual will present a substantial probability of physical harm to others or will incur an immediate or imminent substantial probability of physical harm, impairment, injury, or debilitation (immediate or imminent substantial probability of harm, etc., shown by current Ch. 880 standard or current Ch. 51 dangerousness standards.)

§ 55.14 (3).

- e. Adopts current Ch. 880 provisions regarding post-order requirements (development of treatment plan, etc.)
- f. Requires DHFS to promulgate rules that require nursing homes, CBRFs, AFHs and RCACs to provide information on compliance with provisions relating to involuntary administration of psychotropic medications. § 50.02 (2) (ad).

### **III. Reporting & Responding to Suspected Abuse**

#### **A. 2005 Wisconsin Act 388**

2005 Assembly Bill 539 (as amended by Assembly Amendments 1, 3, 4, 5, 6, & 7)

- 1. Result of Joint Legislative Council's Special Study Committee on the Recodification of Ch. 55, Placement & Services for Persons with Disabilities. Based upon the work of the Adult Protective Services Modernization Project of the Department of Health & Human Services.
- 2. Dubbed "APS Modernization Bill."
- 3. Introduced July 7, 2005.
- 4. Signed by Governor on May 10, 2006
- 5. Effective Date: First day of 7<sup>th</sup> month beginning after publication.  
December 1, 2006.
- 6. Websites
  - a. For pre-December 1, 2006 sec. 46.90 -  
[www.legis.state.wi.us/statutes/2003/03Stat0046.pdf](http://www.legis.state.wi.us/statutes/2003/03Stat0046.pdf)
  - b. For Chapter 46 as revised by Acts 264 and 388 (elder abuse reporting is on pages 77 to 82) –

- [www.legis.state.wi.us/statutes/Stat0046.pdf](http://www.legis.state.wi.us/statutes/Stat0046.pdf)
- c. For Chapter 55 as revised by Acts 264 and 388 –  
[www.legis.state.wi.us/statutes/Stat0055.pdf](http://www.legis.state.wi.us/statutes/Stat0055.pdf)
- d. For Act 388-  
[www.legis.state.wi.us/2005/data/acts/05Act388.pdf](http://www.legis.state.wi.us/2005/data/acts/05Act388.pdf)
- e. For AB 785 and amendments-  
[www.legis.state.wi.us/2005/data/AB539hst.html](http://www.legis.state.wi.us/2005/data/AB539hst.html)
- f. For CWAG's website and links-  
[www.cwag.org/legal/guardian-support](http://www.cwag.org/legal/guardian-support)

## **B. Summary**

1. Revises chapter 46 governing the reporting of and response to allegations of abuse, self-neglect, neglect and financial exploitation of elders.
2. Revises chapter 55 to permit all counties to investigate reports of suspected abuse, self-neglect, neglect and financial exploitation of vulnerable adults ages 18 to 59; currently only Milwaukee County has this authority.

## **C. New Terms and Definitions**

1. "Elder adult at risk" – "a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." § 46.90 (1) (br).
2. "Adult at risk" - "any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." § 55.01 (1e).
3. "Elder-adult-at-risk agency" – "the agency designated by the county board of supervisors ... to receive, respond to, and investigate reports of abuse, neglect, self-neglect, and financial exploitation....." § 46.90 (1) (bt).
4. "Adult-at-risk agency" – "the agency designated by the county board of supervisors ... to receive, respond to, and investigate reports of abuse, neglect, self-neglect, and financial exploitation ...." § 55.01 (1f).
5. Updates definitions of "abuse," "financial exploitation," "neglect," and "self-neglect." §§ 55.01 (1), 46.90 (1) (ed), 46.90 (1) (f) & 46.90 (1) (g).

#### D. Who Reports?

1. Wisconsin's current system is based on voluntary reporting. "Any person may report ..." § 46.90 (4).
2. But the Caregiver Reporting System imposes a reporting requirement on regulated entities to report misconduct by caregivers. § 146.40 (4r).
3. Act 388 clarifies that an attorney or a person working under the supervision of any attorney may report elder abuse. §§ 46.90 (4) (ar) & 55.043 (1m) (br).
4. Act 388 requires that:
  - a. An employee of any entity that is licensed, certified, or approved by, or registered with DHFS; § 46.90 (4) (ab) 1.
  - b. A health care provider as defined in s.155.01 (7); § 46.90 (4) (ab) 3.
  - c. A social worker, professional counselor, or marriage and family therapist certified under ch. 457; § 46.90 (4) (ab) 4.

file a report *if*:

- d. The elder adult at risk or adult at risk is seen in the course of the person's professional duties (§ 46.90 (4) (ad)) *and*
- e. The elder adult at risk or the adult at risk has requested the person to make the report (§ 46.90 (4) (ad)) *or*
- f. There is reasonable cause to believe that the elder adult-at-risk or adult-at-risk is at imminent risk of serious bodily harm, death, sexual assault, or significant property loss *and* is unable to make an informed judgment about whether to report the risk (§ 46.90 (4) (ad) 1.); *or*
- g. Other adults-at-risk are at risk of serious bodily harm, death, sexual assault, or significant property loss inflicted by the suspected perpetrator (§ 46.90 (4) (ad) 2.);
- h. *Unless* the person believes that filing the report would not be in the best interest of the elder adult-at-risk or adult-at-risk *and*

documents the reasons for their belief in the case file of the suspected victim. § 46.90 (4) (ae) 1.

#### **E. Immunity Provisions**

1. Immunity provisions apply to new reporters. Immunity provisions apply if filed with incorrect agency but reporter had a good faith belief that the report was filed correctly with the correct department. §§ 46.90 (4) (ar) & (c); 55.043 (1m) (d).
2. Penalty for retaliating against a reporter increased to \$10,000. §§ 46.90 (9) (d) & 55.043 (1m) & (9m).
3. Rebuttable presumption created that any discharge or act of retaliation or discrimination taken against a reporter within 120 days after the report is made is retaliatory. §§ 46.90 (4) (b) 1. cm & 55.043(1m) (c).

#### **F. Where To Report?**

1. County social / human services department
2. Elder-adult-at-risk / adult-at-risk agency
3. DHFS
4. State or local law enforcement agent
5. Board on Aging and Long-term Care

§§ 46.90 (4) (ar) & 55.043 ((1m) (br)).

#### **G. Investigations**

1. Treats financial exploitation the same as other abuse – investigation must begin within 24 hours, not counting weekends and legal holidays. §§ 55.043 (1r) (a) 1g. and 46.90 (5) (a) 1.
2. Reports regarding clients of entities regulated by DHFS will be referred to DHFS for investigation if suspect is caregiver or nonclient resident of the entity. §§ 46.90 (5) (a) 1 and 55.043 (1r) (a) 1g.
3. Authorizes multi-agency response, including strengthening law enforcement involvement; authorizes exchange of investigative information and reports with appropriate agencies. §§ 55.043 (2) and 46.90 (5) (c).
4. Authorizes additional investigative tools such as ability to interview adult/elder with or without consent of guardian; interview guardian; review financial records without consent. §§ 55.043 (1r) (b) and 46.90 (5) (b).

## **H. Services and Responses If Complaint Substantiated**

1. May request immediate assistance in initiating protective services action or contacting law enforcement or other public agency, as appropriate. §§ 55.043 (4) (b) 1 & 46.90 (5m) (br) 1.
2. May take appropriate emergency action, including emergency protective placement. §§ 55.043 (4) (b) 2 & 46.90 (5m) (br) 2 .
3. May refer case to local law enforcement for further investigation or to DA if elder/ adult-at-risk agency believes crime has been committed. §§ 55.043 (4) (b) 3 & 46.90 (5m) (br) 3.
4. May refer case to licensing or certification authorities within DHFS or other regulatory bodies if residence, facility or program is or should be regulated. §§ 55.043 (4) (b) 4 & 46.90 (5m) (br) 4.
5. May refer case to Department of Regulation and Licensing if case involves an individual required to hold a credential under Chs. 440-460, Stats. §§ 55.043 (4) (b) 5 & 46.90 (5m) (br) 5.
6. May bring or refer for a petition for guardianship and protective services/placement if necessary. §§ 55.043 (4) (b) 6 & 46.90 (5m) (br) 6.

## **I. Confidentiality**

1. Makes distinction between “reports” and “records” and distinguishes where each can be released.
  - a. “Reports”– are documentation of an agency’s response to a report and the investigation response that provides a summary of case, including DHFS-submitted report. §§ 55.043 (6) (a) 1 & 46.90 (6) (ac) 1.
  - b. “Records” are any document relating to the response, investigation, assessment and disposition of a report.” §§ 55.043 (6) (a) 2 & 46.90 (6) (ac) 2.
2. Release of “reports” generally same, but adds government agencies needing reports to carry out responsibilities related to protecting adults-at-risk and to reporters who made report in professional capacity, regarding actions taken to protect or provide services. §§ 55.043 (6) (b) 9. & 10; 46.90 (6) (b) 9. & 10.

3. Notwithstanding, can't release if might be contrary to victim's best interests, cause victim harm, or might jeopardize on-going civil or criminal investigation. §§ 55.043 (6) (br) 1.-3 & 46.90 (6) (br) 1.-3.
4. Release of "records" only to elder / adult-at-risk who is named victim, legal guardian, conservator or other legal representative (unless is alleged perpetrator), law enforcement officials and DA for their purposes, DHFS or law enforcement for certain statutory death investigations, to employee of county department providing services to determine whether victim should be transferred to less restrictive or more appropriate treatment modality, attorney or GAL to prepare for certain court hearings, DHFS for management, audit, etc. purposes, staff members of protection and advocacy agency, coroner, pathologist, etc., investigating deaths in unexplained or suspicious circumstances, probation/parole agency where supervising alleged perpetrator in certain circumstances, grand juries, courts or administrative agencies under § 968.26, Stats. §§ 55.043 (bt) & 46.90 (6) (bt).

#### **J. Restraining Orders**

1. Creates a vulnerable adult restraining order to protect victims and workers. § 813.123 (2) (a).
2. Puts the non-interference provisions in § 46.90 and Ch. 55, Stats.
3. Creates a real restraining order that may be petitioned for by an individual at risk, his/her guardian, interested person acting on behalf of an individual at-risk or elder / adult-at-risk agency.
4. If someone other than the elder / adult-at-risk petitions, there must be notice to the individual at risk and appointment of a GAL.
5. Actions that may be enjoined include: interfering with investigation or provision of services, actions or threats to engage in abuse, financial exploitation, neglect, harassment, stalking of individual at risk or mistreatment of animal.

**08/14/2006**